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No. 93-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD B. NELLIS, *et al.*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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15 pp

TABLE OF CONTENTS

	Page
I. THE DECISION BELOW IS NOT A ROUTINE APPLICATION OF SETTLED DUTY OF FAIR REPRESENTATION PRINCIPLES; IT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.	2
II. THE PREEMPTION DECISION IS INCONSISTENT WITH DECISIONS OF THIS COURT EXPRESSLY APPROVING ASSUMPTION OF CONTRACT DUTIES GREATER THAN THE DUTY OF FAIR REPRESENTATION	6
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
ALPA v. O'Neill, 499 U.S. 65 (1991)	4
Aguirre v. Automotive Teamsters, 633 F.2d 168 (9th Cir. 1980)	3
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	6
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	1
Barton Brands v. NLRB, 529 F.2d 793 (7th Cir. 1976)	3,4,5
Bernard v. ALPA, 873 F.2d 213 (9th Cir. 1989)	4,5
Conley v. Gibson, 355 U.S. 41 (1954)	1
Crawford v. ALPA, 992 F.2d 1295 (4th Cir. 1993)	2
In Re Glass Workers, Local No. 173, 983 F.2d 725 (6th Cir. 1993)	7
Hawaiian Airlines, Inc. v. Norris, 62 U.S.L.W. 4537 (June 20, 1994)	7,9
I.B.E.W. v. Hechler, 481 U.S. 851 (1987)	8,10
J.I. Case Co. v. Borak, 377 U.S. 426 (1964)	7
Johnson v. United Food & Commercial Workers, 828 F.2d 961 (3d Cir. 1987)	8
Jones v. Trans World Airlines, Inc., 495 F.2d 790 (2d Cir. 1974)	4,5
Local 1814, International Longshoremen's Association v. NLRB, 735 F.2d 1384 (D.C. Cir.), *cert. denied*, 469 U.S. 1072 (1984)	3
North River Energy Corp. v. UMW, 664 F.2d 1184 (11th Cir. 1981)	3
Peterson v. ALPA, 759 F.2d 1161 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985)	7
Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985)	8

Table of Authorities Continued

	Page
Rakestraw v. United Airlines, Inc., 981 F.2d 1524 (7th Cir. 1992), *cert. denied*, 114 S. Ct. 175 (1993)	6
Richardson v. United Steelworkers of America, 864 F.2d 1162 (5th Cir.), *cert. denied*, 493 U.S. 803 (1989)	8
Teamsters Local 42 v. NLRB, 825 F.2d 608 (1st Cir. 1987)	4,5
United Steelworkers of America, AFL-CIO v. Rawson, 495 U.S. 362 (1990)	8,10
STATUTES	
29 U.S.C. § 185	7,9

REPLY BRIEF FOR THE PETITIONERS

Respondent argues in opposition to the petition that this "intensely fact-bound" case involves "routine applications of federal labor law" (Opp. Br. 9). Respondent is wrong on both counts. As the court below recognized, this case presents "a novel question regarding the scope of the preemptive effect of federal labor law" (App. 49a), and "novel questions concerning the scope of the federal duty of fair representation" (App. 6a). Respondent's statement of facts, moreover, ignores the principal factual conclusion reached by the lower court: "a reasonable jury could draw sufficient inferences from the factual record to accept plaintiffs' theory" that "ALPA engaged in a unified strategy to minimize and evade its obligations to the Eastern pilots" because they had become "politically unpopular with the majority of the ALPA membership."(App. 35a-36a).[1] Respondent's effort to ignore this key conclusion of the court below cannot obscure the fact that this case presents important questions of labor law and policy about the proper scope of the judicially implied duty of fair representation and its impact on the normal range of state contract remedies that protect the citizens of each state from breach of promise. In the resolution of these questions, the lower court decisions conflict with Constitutional provisions, decisions of this Court, and decisions of other circuits.

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[1] Respondent's factual recitation distorts in numerous instances the facts and reasonable inferences from the factual record below. Its factual account is inconsistent with the procedural posture of the case—the allegations and factual record must be viewed in the light most favorable to petitioners on motions to dismiss or for summary judgment. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1954); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

I. THE DECISION BELOW IS NOT A ROUTINE APPLICATION OF SETTLED DUTY OF FAIR REPRESENTATION PRINCIPLES; IT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

1a. Respondent errs in contending that this is simply a run of the mill case in which the union was required to accommodate "the competing interests" of different groups within the union and the courts uniformly hold that a union is entitled to wide deference (Opp. Br. 10-11). Respondent's formulation misses the key fact that, in this case, the union made the decision as to how these competing interests would be accommodated *in advance of* the transfers of Eastern assets,[2] and that the Eastern pilots relied on this decision, communicated to them by the union during the strike.

Contrary to Respondent's suggestion, Petitioners do not claim that ALPA breached its duty of fair representation simply because they do not like the *result* (Opp. Br. 11). Petitioners claim that the union cannot permissibly deny Petitioners promised seniority integration by improper means. Thus, ALPA was not entitled to ignore or amend or interpret out of existence its previous commitments on which the minority had relied. Likewise, ALPA was not permitted actively to negotiate with the managements of the acquiring carriers *against* the seniority integration it had committed itself to support.[3] The decisions cited by

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[2] ALPA is a unitary labor organization in which the Master Executive Councils ("MECs") that are elected by the pilots at each ALPA airline to protect their interests have no existence independent from ALPA (App. 7a). *See also, Crawford v. ALPA*, 992 F.2d 1295, 1298 (4th Cir. 1993) (*en banc*). The MECs for the acquiring carriers were represented on the ALPA Executive Board, which voted to promise striking Eastern pilots that Merger Policy would be applied to protect their lateral seniority in the event of a breakup of Eastern caused by the strike. As constituent parts of ALPA, the MECs and all union members are bound by the union's policies and the actions of its duly authorized officers (App. 7a).

[3] ALPA's claim that the "district court found no evidence that *ALPA* (as opposed to individual pilots at other airlines) 'objected' to the trans-

Respondent that give unions wide latitude to decide between competing union groups (Opp. Br. 11) all involve situations in which the union had made no prior commitment on the subject and had not subverted its own policies. They are, therefore, wholly inapposite.

Respondent also contends that the lower court properly concluded, out of "respect for the process of union democracy" (App. 27a) that ALPA did not unlawfully discriminate against Eastern pilots so long as it "complied with the literal terms of its Fragmentation Policy" as amended to reflect ALPA's eroding commitment to seniority integration for Eastern pilots (App. 41a).[4] Following

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fer with lateral seniority at other carriers" (Opp. Br. 7 n.4), mischaracterizes the district court decision, the structure of ALPA, and the factual record. The portion of the district court decision Respondent relies upon does not even discuss the evidence of interference with the managements of the acquiring carriers, but instead holds that statements by MEC officers (the "individual defendants") at internal ALPA proceedings were "not evidence of bad faith" (App. 24a n.9).

The evidence was clear that Pan Am MEC officers talked directly to Pan Am management and objected to management's public agreement to the lateral transfer of Eastern pilots in connection with Pan Am's acquisition of 14 Eastern B-727 aircraft in 1989 (App. 14a). Likewise, there was evidence that in 1989 the U.S. Air MEC objected vigorously to management's insistence on lateral transfer of Eastern pilots in connection with U.S. Air's planned acquisition of 15 Eastern B-757s (App. 14a-15a). And Captain Alger, a Delta Vice President, testified that he and the Delta MEC Chairman agreed that the Fragmentation Policy did not apply to Delta's acquisition of Eastern aircraft and routes in 1991 (App. 15a).

The MEC officers who objected to their management's support of lateral transfers were not merely "individual pilots" (Opp. Br. 7 n.4). Under ALPA's unitary organizational structure, see note 2, *supra*, they were officers of ALPA itself, who were bound by ALPA's commitment to lateral seniority transfer, and whose actions were the actions of ALPA. *See Local 1814, Int'l Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384, 1394-97 (D.C. Cir.), *cert. denied*, 469 U.S. 1072 (1984); *North River Energy Corp. v. UMW*, 664 F.2d 1184, 1190 (11th Cir. 1981); *Aguirre v. Automotive Teamsters*, 633 F.2d 168, 171-72 (9th Cir. 1980); *Barton Brands v. NLRB*, 529 F.2d 793, 797-98 (7th Cir. 1976).

[4] The lower court properly recognized that a union could not "disregard its policy . . . once the policy was established and [a minority

the "literal terms" of a policy that has been amended to eliminate an obligation upon which union members have relied cannot exonerate ALPA from liability for its breach of promise under the duty of fair representation. Nor does the following the literal language of the amended Policy justify ALPA's active opposition to management's support for lateral transfer.

1b. Respondent is wrong when it suggests that this Court's decision in *ALPA v. O'Neill*, 499 U.S. 65 (1991) has removed any conflict with the "handful of pre-*O'Neill* decisions" from other circuits cited by Petitioners (Opp. Br. 13). As Respondent concedes (Opp. Br. 10), *O'Neill* rejected ALPA's argument that its collective bargaining conduct was immune from all judicial review. It held further that an attack on the *results* (as opposed to the methods) of collective bargaining as "arbitrary"in violation of the duty of fair representation could only succeed if the results were "wholly irrational." 499 U.S. at 78. Contrary to Respondent's suggestion, *O'Neill* does not affect the holdings in *Bernard v. ALPA*, 873 F.2d 213, 217 (9th Cir. 1989), *Teamsters Local 42 v. NLRB*, 825 F.2d 608, 611 (1st Cir. 1987); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-799 (7th Cir. 1976); and *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 797-98 (2d Cir. 1974) that a union discriminates against the minority when it acts solely to benefit the union majority.

Respondent's halfhearted attempt to distinguish away the conflicts with these decisions from the First, Second,

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union group] stood ready to benefit from it" (App. 27a). It then approved ALPA's amendments to the Policy to evade its obligations after Eastern pilots had struck in reliance on the promise that the Policy would apply, acknowledging that "[p]laintiffs may understandably take little consolation from the Court's holding that while ALPA was not permitted to ignore the Fragmentation Policy to plaintiffs' detriment, ALPA was free to alter the Policy in such a way as potentially to deprive plaintiffs of the Policy's benefits" (App. 27a n. 10). This view of a union's duties to the minority provides no protection whatsoever from majority abuse whenever a union is sophisticated enough to document its breach of promise as a formal change of union policy.

Seventh and Ninth Circuits is unpersuasive. Respondent first contends, incorrectly, that, unlike here, in *Bernard* and *Jones* the union minority was excluded from participation in internal union proceedings leading to an adverse decision. In fact, these courts were concerned not with exclusion from internal union proceedings, but with the fact that the disadvantaged group, like the Eastern pilots here, was excluded from negotiations *with the employer*. *Bernard*, 873 F.2d at 216 ("no [new] pilot was permitted to participate in ALPA negotiations with [the employer] after the merger, despite requests to do so"); *Jones*, 495 F.2d at 794-95. The point of *Bernard* and *Jones* is that a union engages in unlawful discrimination when it refuses to negotiate for a new union group solely to benefit the existing union membership which constitutes the majority. The point of *Teamsters Local 42*, which Respondent makes no attempt to distinguish, is the same. 825 F.2d at 611 ("[u]nion members are to be accorded equal rights, not subjugated arbitrarily to the desires of a 'stronger, more politically favored group' "). These decisions conflict with the lower court decision here that it was permissible for the union to renege on its promises because honoring them "would be politically unpopular with the majority of the ALPA membership" (App. 35a.).

Respondent claims that *Barton Brands* is consistent with the lower court decision here because it permits sacrifice of minority interests where the union has shown "some objective justification for its conduct" (Opp. Br. 13). The lower court did not find that ALPA was "justified" in refusing to honor its commitment to lateral transfer for any reason other than the fact that the majority wished that result, and then pursued the proper formalities to achieve the result by amending union policies (App. 42a). *Barton Brands* explicitly limits union authority to prefer majority interests where, as here, the union minority has acted in reliance on a policy that would have protected their interests. *Barton Brands*, 529 F.2d at 800 (distinguishing cases approving seniority integrations on the ground that in those cases the disadvantaged group had

not acted "in reliance on" a promise later withdrawn by the union). *Barton Brands* is thus in direct conflict with the decision here that permits such conduct so long as it is accomplished through the empty formalism of amending the union policy, which the majority can always do.

This is not to say that there is no situation in which a union may permissibly prefer the union majority over the minority. Here, however, the lower court erred when it reasoned, following *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 175 (1993) and in conflict with the decisions of other circuits, that *the fact that the majority favored the sacrifice* of Eastern pilots' promised seniority rights was, *in itself*, sufficient justification for the union's conduct even where the conduct was part of a union campaign to "evade" its obligations to those pilots. This sanctification of majority rights eviscerates the protection afforded minorities under the implied duty of fair representation crafted by this Court, and raises important issues of labor law and policy that warrant this Court's review.[5]

II. THE PREEMPTION DECISION IS INCONSISTENT WITH DECISIONS OF THIS COURT EXPRESSLY APPROVING ASSUMPTION OF CONTRACT DUTIES GREATER THAN THE DUTY OF FAIR REPRESENTATION.

2a. Respondent argues that the decision below does not conflict with this Court's preemption jurisprudence, citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-212 (1985) for the proposition that this Court has preempted state law on the basis of implied rights of action (Opp. Br. 18 n. 9). *Allis-Chalmers* did not concern the implied duty of

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[5] Respondent's argument that the lower court properly applied this Court's arbitrariness standard does not address the fact that the lower court found ALPA's conduct was not arbitrary solely because the result "follow[ed] the wishes of the majority" (App. 22a). Likewise, Respondent simply ignores the conflict between those circuits that require, in a bad faith claim, a showing that the union intended to violate a promise when made, and those that hold that a breach of promise is actionable without regard to intent (Pet. 18-19 n. 7).

fair representation at issue here, nor did it concern any *implied* federal right. Instead, that case dealt with preemption of state law by section 301 of the Labor Management Relations Act ("LMRA"), which explicitly provides that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court in the United States. . . ." 29 U.S.C. § 185. This Court's very recent unanimous decision in *Hawaiian Airlines, Inc. v. Norris*, 62 U.S.L.W. 4537, 4539 (June 20, 1994), a case dealing with preemption under the Railway Labor Act ("RLA") as this case does, reiterates the Court's consistent view that congressional intent is the touchstone for preemption analysis: "[w]hether federal law pre-empts a state law establishing a cause of action is a question of congressional intent." Respondents have failed to cite a single decision of this Court holding that the required congressional intent to preempt state law can ever be found for a duty that is implied by the courts.[6] The decision below that the implied duty of fair representation preempted state law contract claims thus conflicts with this Court's consistent interpretation of the Supremacy Clause to require as a prerequisite to preemption clear expression of congressional intent to supplant state law.[7]

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[6] Notwithstanding Respondent's assertion that "[w]hen Congress granted unions the exclusive authority to represent railroad and airline employees . . . it imposed a corresponding 'statutory duty' to represent employees fairly" (Op. Br. 15), Congress imposed no express duty. Instead, this Court implied a duty of fair representation from Congress' grant of exclusive representational authority to unions, in a manner similar to that in which the Court has implied causes of action from other statutes that create no express claim. *E.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

[7] Respondent cites several lower court decisions which it claims have preempted state law claims on the basis of the duty of fair representation (Opp. Br. at 17-18). All are distinguishable. They involve preemption on the basis of section 301 of the LMRA, *In Re Glass Workers, Local No. 173*, 983 F.2d 725, 728-29 (6th Cir. 1993); preemption because they depend on the interpretation of a collective bargaining agreement, *Peterson v. ALPA*, 759 F.2d 1161 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985); preemption of tort, not contract claims where the duty alleged is based solely on the union's status as collective bargaining agent,

2b. Respondent argues nevertheless that state contract law must be preempted by the duty of fair representation because unions would otherwise be faced with conflicting obligations to their members. This contention is simply not true. This Court has twice held that unions may by contract assume obligations to their members greater than those imposed by the duty of fair representation. *United Steelworkers of America, AFL-CIO v. Rawson*, 495 U.S. 362 (1990); *I.B.E.W. v. Hechler*, 481 U.S. 851, 860 (1987). An advance agreement as to how competing interests in the union will be resolved in future circumstances is not a *per se* violation of the duty of fair representation, as Respondent's argument would suggest. Nor would the union's compliance with such an advance agreement force it to violate its duty of fair representation to a particular group in the union that is disadvantaged by the agreement. Quite the contrary: the union would honor its duty *both* to the minority *and* to the majority by vigorously enforcing a policy to which both camps had agreed, and on which the minority had detrimentally relied.

2c. Respondent attempts unsuccessfully to distinguish *Rawson* and *Hechler* on the ground that they have no bearing on preemption of state contract law because they involved claims that the duty of fair representation preempted a federal breach of contract action provided by

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Richardson v. United Steelworkers of Am., 864 F.2d 1162 (5th Cir.), *cert. denied*, 493 U.S. 803 (1989); *Johnson v. United Food & Commercial Workers*, 828 F.2d 961 (3d Cir. 1987); and claims against non-union parties, *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985). Indeed, *Richardson*, which discussed preemption in the context of deciding an issue of Federal court removal jurisdiction, specifically noted that it was not addressing a situation where the union had assumed an obligation directly to its members, as ALPA did in this case. 864 F.2d at 1167.

To the extent some of these cases may be read to have preempted state law claims based solely on the implied duty of fair representation, they are, like the decision below, in conflict with this Court's preemption jurisprudence. The fact that a number of the lower courts may have gone astray in this area emphasizes the need for this Court to grant the petition and require adherence to its prior decisions.

section 301 of the LMRA, not a state contract claim. The RLA provides no federal contract claim similar to section 301. All contract claims against RLA unions must, therefore, arise under state law. Respondent cites no authority that Congress intended RLA unions to be uniquely relieved from their contract obligations or, unlike LMRA unions, disabled from assuming contract obligations greater than those implied by the duty of fair representation.

This Court has, moreover, recently rejected the distinction drawn by Respondent between RLA unions and LMRA unions for preemption purposes. In *Hawaiian Airlines, Inc. v. Norris*, the Court held that principles derived from cases involving a conflict between the LMRA and another federal statute were equally applicable to a case involving "RLA preemption of a cause of action arising out of *state* law." 62 U.S.L.W. at 4541 n. 6. That is because "[p]rinciples of federalism demand no less caution in finding that a federal statute pre-empts state law." *Id.* Under the reasoning of *Hawaiian Airlines*, just as the duty of fair representation does not immunize a union from suit for breach of contract under section 301 of the LMRA, as *Rawson* and *Hechler* hold, it likewise provides no immunity to unions from suits for breach of contract under state law.

Hawaiian Airlines' narrow view of preemption is instructive for another reason. The Court held that the *express* statutory remedies of the RLA for resolution of "minor disputes"—those relating to breach of a collective bargaining agreement—did not preempt a state law claim by a union member for wrongful discharge: "a state law cause of action is not pre-empted by the RLA if it involves rights and obligations independent of the collective bargaining agreement." 62 U.S.L.W. at 4541. Respondent's argument for a much broader preemption flowing from the *implied* duty of fair representation—without identifying any substantive provision of the RLA with which enforcement of state contract law would conflict—is thus inconsistent in fundamental principle with the Court's la-

bor preemption jurisprudence as recently articulated in *Hawaiian Airlines*.

2d. Respondent's contention that *Rawson* and *Hechler* do not apply where collective bargaining conduct is involved is unsupported by any decision of this Court. No case cited by Respondent has created a special zone of immunity from state contract law for conduct that touches on collective bargaining. Respondent makes no effort to distinguish those cases cited by Petitioner (Pet. 11-12) that have refused to exempt collective bargaining conduct from state law scrutiny. And *Rawson* and *Hechler* do not themselves suggest that unions can assume only some obligations beyond those imposed by the duty of fair representation, but not if they are related to collective bargaining. Indeed, this Court noted in *Rawson* that "[w]e have never held, however, that as a matter of federal law, a labor union is *prohibited* from voluntarily assuming additional duties to the employees by contract," and explicitly rejected the argument made by the union in that case that "only the duty of fair representation governs the exercise of its representational functions under the collective bargaining contract." *Rawson*, 110 S. Ct. at 1911. Accordingly, contrary to Respondent's similar argument here, the lower court preemption of state contract claims is in conflict with this Court's clear holding that unions are not exempt from their obligations to live up to their contracts.[8]

CONCLUSION

The petition for writ of certiorari should be granted.

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[8] Respondent's final argument that certiorari is improper on the preemption point because the district court held that there was no breach of contract is inconsistent with the lower court's conclusion that a "reasonable jury" could find that "ALPA engaged in a unified strategy to minimize and evade its obligations to the Eastern pilots" (App. 35a-36a).

Respectfully submitted,

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